STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2005
v	No. 253621 Oakland Circuit Court
CLIFFORD HAMILTON GLENN, Defendant-Appellant.	LC No. 2003-191880-FH

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant Clifford Glenn of resisting or obstructing a police officer,[1] and the trial court sentenced him as a fourth habitual offender[2] to a prison term of 1 to 15 years. He appeals as of right. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

On the evening of July 28, 2003, Officer Post stopped Glenn's vehicle because his license-plate light was burned out. After receiving Glenn's driver's license, proof of insurance, and registration, Post returned to his car and ran Glenn's name on the Law Enforcement Information Network, which indicated that there was a warrant for Glenn's arrest. Post and a second officer named Wallace returned to Glenn's car to ask him to get into the back seat of the police car while they waited for confirmation that the warrant was valid.

When Post asked Glenn to step out of the vehicle because he had a warrant for his arrest, Glenn disputed that fact, then rolled up his window. Post opened the driver's side door, which was unlocked, and he and Wallace both advised Glenn to step out of his vehicle. Glenn again refused and said numerous times that they were violating his civil rights. Wallace testified that he and Post attempted to talk Glenn out of his car for about fifteen minutes. According to Wallace, Glenn began to reach under the seat, so he told Glenn to raise his hands, and Post grabbed Glenn's left wrist.

[1] MCL 750.81d(1).

[2] MCL 769.12.

After receiving radio confirmation that the warrant was valid, Post told Glenn that the warrant was valid and that he needed to come out of the vehicle or he would be forcibly removed. Glenn again refused, and both officers attempted to forcibly remove Glenn. As Post grabbed Glenn's left arm and Wallace took hold of his right wrist, Glenn grabbed the steering wheel, kicked at the officers, and attempted to push Post out of the way. Post then sprayed a three- to five-second burst of pepper spray in the vehicle. Post testified that Glenn continued to hold the steering wheel, but eventually let go, and they were able to get Glenn out of his car and onto the ground. Glenn then kept his arms underneath his chest, and the officers struggled to get his hands behind his back but eventually were successful. Two other officers arrived at the scene and assisted in subduing Glenn so that he could be handcuffed.

At trial, Post testified that he thought he heard Glenn say he had "problems in the past with officers," and Wallace stated that Glenn told him that he was afraid of police officers because police officers had beaten him before. Glenn waived his right to testify and did not call any witnesses. During review of the trial court's likely jury instructions, defense counsel asked that the defense of duress be added to the instructions, asserting that there was evidence that Glenn was afraid of the officers, which caused him to react in the manner he did. The trial court denied defense counsel's request, stating that Glenn's out-of-court assertion was not offered for the truth of the matter asserted.

After the trial court initially instructed the jury on the elements of the offense and the jury had left the courtroom, the prosecution objected to the instructions, noting that the statute includes the language "assault and battery, wound, resist, obstruct, oppose or endanger." Defense counsel responded that "it's the jury instruction [that] has the language and we just ask the [c]ourt that they [sic] stick with the jury instruction language." After reviewing the standard jury instruction[3] and the statute as charged against Glenn, the trial court agreed with the prosecution and again asked defense counsel what her position was regarding the changes. Defense counsel replied that her position remained the same. Finally, the trial court agreed to the changes and re-instructed the jury with the pertinent statutory language.

II. Sufficiency Of The Evidence

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[4]

[3] We note that the trial court apparently was reviewing the standard criminal jury instruction used when prosecuting for resisting arrest under MCL 750.479. But in this case, Glenn was prosecuted under MCL 750.81d, and a standard jury instruction for this offense had yet to be adopted.

[4] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

B. MCL 750.81d(1)

Glenn first argues that there was insufficient evidence at trial to support his convictions. Glenn was convicted under MCL 750.81d(1), which reads, in pertinent part, that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony." Under the older resisting arrest statute that is still in effect, MCL 750.479, whether the arrest was lawful was an essential element for conviction, and a person could use reasonable force to resist an unlawful arrest.[5] However, under the newly enacted resisting arrest statute, MCL 750.81d, a person may not forcibly resist an arrest by a police officer who is performing his or her duties even if the arrest is illegal.[6]

Here, Glenn refused to get out of his vehicle when asked. When the officers attempted to forcibly remove him from his vehicle, Glenn grabbed the steering wheel, kicked at the officers, and attempted to push one of them out of the way. Glenn essentially admits that he resisted arrest, but argues that he had the right to resist an unlawful arrest, and that *People v Ventura* was wrongly decided. However, the decision in *Ventura* is binding on this Court.[7] Further, regardless of the decision in *Ventura*, Glenn's arrest was lawful because the arresting officer had reasonable cause to believe that Glenn had a valid arrest warrant based on the LEIN information.[8] Viewed in a light most favorable to the prosecutor, the evidence was sufficient to support Glenn's conviction.

III. Jury Instructions

A. Standard Of Review

We review claims of instructional error de novo.[9]

B. Duress Defense

Glenn argues that the trial court erred by failing to give the requested instruction on the defense of duress. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that the evidence supports.[10] However, the trial court should refuse to give a requested instruction on a theory of defense if there is no evidence supporting it.[11]

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[5] *People v Macleod*, 254 Mich App 222, 226-227; 656 NW2d 844 (2002).

[6] *People v Ventura*, 262 Mich App 370, 377-378; 686 NW2d 748 (2004).

[7] MCR 7.215(J)(1).

[8] See *People v Freeman*, 240 Mich App 235, 236-237; 612 NW2d 824 (2000) (a police officer's reliance on LEIN information made a subsequent arrest lawful).

[9] *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

[10] *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

[11] *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod 450 Mich 1212 (1995).

A defendant may assert the defense of duress in situations where the crime committed avoids a greater harm.[12] To properly raise the defense, the defendant has the burden of producing prima facie evidence that would allow the jury to conclude that the essential elements of duress are present.[13] The elements of duress are as follows:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm.[14]

Glenn claims there was sufficient evidence to support the duress defense, including testimony that he did not get out of his vehicle because he was afraid of the officers. However, this evidence was insufficient to constitute prima facie evidence of duress. There was no evidence that, on the night in question, Glenn was threatened with any conduct that effectively forced him to resist the police officers, as this defense would require; rather, Glenn merely resisted arrest when asked to get out of his vehicle. Further, a defendant's fear of death or serious harm must be reasonable under an objective standard to support a duress defense.[15] Glenn's alleged subjective fear of being physically assaulted by the arresting officers was clearly unreasonable because there was no evidence that the police officers in this case threatened him with death or serious bodily harm. Thus, we conclude that the trial court acted properly by not instructing the jury on the defense of duress.

C. Defining "Assault"

In his second claim of instructional error, Glenn argues that the trial court failed to define "assault" for purposes of the charged offense, which allowed the jury to speculate regarding the standard. Because Glenn did not timely request the trial court to define "assault" to the jury, he has forfeited this issue,[16] and we will reverse only if Glenn can establish the existence of plain error that affected his substantial rights.[17]

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[12] *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997).

[13] *Id*.

[14] *Id*. at 247.

[15] See *id*.

[16] *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999).

[17] See *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

We conclude that the trial court did not err, let alone commit plain error, by failing to define "assault" in its jury instructions. The failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension is not plain error.[18] We believe that "assaulted" is such a generally familiar term. Moreover, MCL 750.81d(1) provides for a conviction when an individual "assaults, batters, wounds, *resists*, obstructs, opposes, or endangers" (emphasis added) a police officer, not merely for assault. Given the undisputed testimony of the police officers regarding Glenn's resistance to them, we believe it is overwhelmingly likely that the jury would have convicted Glenn based on his resisting the police officers without regard to whether he assaulted them. Accordingly, any error in failing to define assault in the jury instructions did not affect Glenn's substantial rights.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.[19] This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[20] We review the trial court's factual findings for clear error and review de novo its constitutional determination.[21]

B. Failure To Request "Assault" Definition

Glenn claims that his trial counsel was ineffective because counsel failed to request that the definition of assault be presented to the jury. However, as discussed, the trial court properly instructed the jury on the charged offense. Therefore, any objection by Glenn's counsel to that instruction would have been without merit. Accordingly, Glenn cannot sustain his claim of ineffective assistance of counsel.[22]

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

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[18] See *People v Cousins*, 139 Mich App 583, 593; 363 NW2d 285 (1984).

[19] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[20] *Id*. at 579.

[21] *Id*.

[22] See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (failure to make a futile objection does not constitute ineffective assistance of counsel).